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Standing, Mootness, and Federal Rule 23—Balancing Perspectives

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STANDING, MOOTNESS, AND FEDERAL RULE 23—BALANCING PERSPECTIVES

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The struggle between the maintenance of these traditional rules [governing standing to sue] and the growth of class and public-interest actions reflects perhaps the most heated ideological struggle of our century—between solitary individualism and laissez-faire, on the one hand, and a social conception of the law, the economy, and the state's role, on the other.[1]

In traditional public interest suits[2] in the federal courts, standing and mootness have been used to assure that the action properly raises issues which should be decided by the courts. It is not surprising, therefore, that courts have also invoked these two concepts as threshold requirements for the maintenance of federal class actions.[3]

Although the standing doctrine was developed in suits seeking review of administrative or legislative decision making, federal courts continue to utilize the same standing requirements for both individual and class suits, with very little consideration of whether the doctrine serves a functional purpose when applied to federal class actions, or whether standing to sue and standing to act as a class representative should be two separate concepts.[4] In contrast, the Supreme Court recently has attempted to provide some specific—by no means exhaustive[5]—guidelines regarding the interplay of mootness[6] and Federal Rule of Civil Procedure 23, the class action provision. It is particularly important to consider the current state of the law on both these issues, since the way in which standing and mootness concepts are applied to class actions may have a significant effect on the scope and character

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1. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study,* 73 MICH. L. REV. 793, 855 (1975).

2. For purposes of this article, further references to public interest suits will denote suits other than class actions, although it is recognized that the class action is a form of public interest suit. *Cf.* text accompanying notes 30-40 *infra.*

3. *See* cases cited note 19 *infra.*

4. *See* Bledsoe, *Mootness and Standing in Class Actions,* 1 FLA. ST. U.L. REV. 430, 454 (1973).

5. *See* text accompanying notes 75-109 *infra.*

6. Mootness may be viewed as a "standing concept." *See* note 69 & text accompanying notes 110-13 *infra.*

of class relief and will necessarily affect the extent to which class suits may be used to protect the public interest.

This article examines the application of standing and mootness concepts to actions brought under rule 23. It is submitted that although the potential for abuse and strike suitism is enormous, an analysis of the structure and function of the class suit and its differences from other types of public interest litigation suggests that rigid standing and mootness requirements may not be a necessary or desirable way of regulating class actions. The differences between the two types of litigation suggest alternative means of satisfying the objectives of each. By approaching the problem functionally[7]—that is, by examining the ends the requirements serve and the other ways those results can be achieved —a means of meeting those objectives will be provided, without injecting the amorphous, confused law of standing[8] and mootness in general public interest suits into the already complex certification procedure for class actions. As suggested by one noted jurist, "We want to control, we want to prevent abuses. We do not want to really kill this little beastie. We do not want to so entangle it so that it cannot be used effectively."[9]

I. A Functional Analysis

A functional analysis of standing and mootness reveals that each serves two major purposes. The first is to ensure that the case or controversy requirement of article III, section 2 of the United States Constitution is satisfied and that a "justiciable" issue is presented. The second is prudential, rather than constitutional.[10] It addresses the

7. A functional analysis of standing generally is provided in Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 Harv. L. Rev. 645, 669-90 (1973).

8. Mr. Justice Frankfurter has referred to the law of standing as "this complicated specialty of federal jurisdiction . . . ." Chapman v. FPC, 345 U.S. 153, 156 (1953).

9. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 304 (1973).

10. The question whether standing is constitutionally mandated or merely involves an exercise of judicial self-restraint has been greatly debated. *See generally* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?,* 78 Yale L.J. 816 (1969); Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363 (1973). Although there is no doubt that those elements of the requirement focusing on the need to present issues in an adversary context are necessitated by article III, section 2, it also is certain that the Supreme Court frequently has utilized a rigid standing requirement in order to avoid deciding certain issues. Thus, the Court itself has recognized that its standing decisions often reflect both constitutional and policy considerations. *See, e.g.,* Flast v. Cohen, 392 U.S. 83, 99 & n.20 (1968). Moreover, in one case it noted that "where a dispute is otherwise justiciable, the question

question whether the plaintiff is the proper or adequate representative —whether he truly will protect the public interest.[11] As to class actions, this latter element finds legislative expression in the requirements of rule 23.[12] And it is the very presence of the statutory prerequisites in

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whether the litigant is a 'proper party to request an adjudication of a particular issue,' . . . is one within the power of Congress to determine." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). *But cf.* Perkins v. Lukens Steel Co., 310 U.S. 113, 132 (1940).

11. "The standing requirement serves many purposes, including that of seeing to it that claims are prosecuted to binding resolution on the merits only by those with a sufficient interest to assure an informed and effective presentation." Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 571 (D.C. Cir. 1975).

12.

Rule 23.
CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court

federal class actions that argues for a shift in focus, de-emphasizing the role that traditional, broad-ranging standing or mootness inquiries must play in that context.

It may appear to be academic whether a court considers the dismissal of a suit for failure to fall within the permissible scope of federal judicial power or for failure to meet the rule's prerequisites. As will be seen, however, focusing on rule 23 allows the court much greater discretion in deciding whether to permit the action to proceed,[13] although in many instances dismissal will result regardless of which approach is taken.[14] In others, however, a two-part inquiry into (1)

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shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

13. *See* text accompanying notes 114-34 *infra*.

14. In La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), the Ninth Circuit refused class treatment, finding that the action did not meet three of

whether a case or controversy is presented, and (2) whether the requirements of rule 23 are met, may permit the continuation of the litigation.[15]

A functional approach to the problem also better clarifies the reasons some class actions pass the threshold, while others do not. A brief foray into the current case law quickly reveals the need for this clarification. In general public interest litigation the courts typically have failed to separate the constitutional from the prudential aspects of standing. The result has been a confusing array of cases[16] and an

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rule 23's requirements: 1) typicality (rule 23(a)(3)); 2) adequacy of representation (rule 23(a)(4)); and 3) superiority of remedy (rule 23(b)(3)). Most important to note is that the court's decision was one of policy, which encouraged it to apply the rule's requirements restrictively. Thus Judge Sneed stated that his finding of inferiority was "based upon the belief that restrictions on the flexible language of Rule 23 are a necessary contribution to the effort to avoid the intractable problems of massive class actions and to maintain a wholesome degree of difference between the judicial and administrative functions." 489 F.2d at 468. *Accord, In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974). Another court faced with a similar fact situation might rule differently. *See, e.g.,* Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975).

15. *See, e.g.,* Haas v. Pittsburgh Nat'l Bank, 60 F.R.D. 604, 612 (W.D. Pa. 1973). *See also* text accompanying notes 114-34 *infra.*

In class actions attacking employment discrimination, the courts have generally permitted the plaintiff to challenge all the employer's racially motivated practices, even though the representative has not suffered directly as a result of some of them. *See, e.g.,* Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), *cert. denied,* 414 U.S. 854 (1973). However, these cases may reflect the courts' more liberal treatment of standing in civil rights actions, rather than the fact that they were class actions.

16. Although it is outside the scope of this article to explain in detail the various twists and turns taken by the Supreme Court in applying the standing doctrine, a brief sketch illustrates why it would be undesirable to attempt to apply the doctrine automatically in class actions.

Standing cases may be divided into two classes: those asserting statutory review and those involving non-statutory review. In the latter, the Supreme Court has been slow to permit expanded notions of the plaintiff's right to bring suit. Reflecting the Court's concern for separation of powers, the "direct injury" test was first set forth in Frothingham v. Mellon, 262 U.S. 447, 488 (1923). Gradually this test evolved into one based on whether the plaintiff possessed a "legal right"—in other words, whether the plaintiff could have brought an action if the defendant had been a private citizen rather than the government. *See* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939). The first major move toward a more functional approach to standing problems occurred in Baker v. Carr, 369 U.S. 186 (1962). In that case the Court permitted plaintiff voters to challenge a claimed impairment of their rights resulting from allegedly improper apportionment in the state legislature. Rather than focusing on the rights involved and the merits of the claim, the Court stated that the proper question was: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* at 204. This functional approach and the rejection of separation of powers criteria for deciding standing questions were carried to their peak in Flast v. Cohen, 392 U.S. 83 (1968), in which the Court said, "when standing is placed in issue in a

even more overwhelming display of articles analyzing and criticizing the court decisions[17] and suggesting alternative approaches.[18]

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case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100.

Two 1974 Supreme Court decisions seem to have halted this movement toward a functionally oriented law of standing and signalled a return to a more conceptualistic approach. *See* United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). As summarized in 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 221 (1975), these cases

> have reestablished the dedication of the Supreme Court to Article III limits on standing, expressed in the traditionally confusing terms of direct injury and justified by a renewed emphasis on separation of powers principles. It is once again clear . . . in these and other recent decisions that standing concepts may at times be intermingled with other elements of justiciability, particularly ripeness, mootness, and political questions.

The Court's renewed emphasis on the need for a direct injury, *see* Simon v. Eastern Kentucky Welfare Rights Organization, 96 S. Ct. 1917 (1976), and the increased burden this places on plaintiffs is made even more clear in Warth v. Seldin, 422 U.S. 490 (1975). In that case the Supreme Court denied standing to plaintiffs challenging local zoning ordinances that allegedly excluded low income individuals and, concomitantly, ethnic or racial minorities, despite allegations that the plaintiffs themselves had been so excluded. The Court placed a very heavy burden of pleading on the plaintiffs, requiring them to show that in fact they could have found suitable housing but for the effect of the ordinances. *Id.* at 502.

The Supreme Court has been much more liberal in its treatment of standing in the statutory review area, recognizing the congressional desire for judicial supervision of federal agency activity. *See, e.g.,* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). The test that has gradually evolved requires the plaintiff to show "injury in fact, economic or otherwise," and that the plaintiff's interest is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 152-53 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Although what constitutes a "zone of interests" remains somewhat unclear, the broadened scope of standing in this area lies in the fact that the plaintiff may be permitted to bring suit even when the only injury claimed is to abstract, non-economic interests. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). Thus, absent a similar retreat by the Court in the statutory area, there is a marked distinction between statutory and non-statutory standing, with the latter presenting a much greater barrier to access to the federal courts.

17. *See, e.g.,* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425 (1974); Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968); Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265 (1961); Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968); Scott, *supra* note 7; Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen,* 24 AM. U.L. REV. 835 (1975); Note, *Recent Standing Cases and a Possible Alternative Approach,* 27 HASTINGS L.J. 213 (1975).

18. Alternatives for the standing test are many and varied. Some suggest discarding entirely the focus on the plaintiff's injury and relying instead on a test centered on the issues involved and the propriety of deciding those issues. *See, e.g.,* Homburger, *Private Suits in the Public Interest in the United States of America,* 23 BUFFALO L.

Even more perplexing is the comparable case law in class actions. Most frequently the courts simply note that in actions brought under rule 23 the class representative must have standing in order to be an adequate representative.[19] But what does this mean? To the extent that standing is designed to assure that the plaintiff is the proper representative, it is tautological. To the extent that standing requires the representative to demonstrate that the adjudication of his claim does not violate historic notions of separation of powers, the requirement is meaningless in suits challenging private activity.[20] Thus, in many instances all the courts seem to be concerned with is that the representative have a claim for relief[21] or that he be a member of the class.[22] As will be shown in Part V, however, the fact that the representative has a claim for relief is just one element of the complex question of

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REV. 343, 408 (1974); Jaffe, *Standing Again,* 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis,* 25 VAND. L. REV. 479, 511 (1972). One author argues that standing concerns are essentially the same as those utilized when determining whether a cause of action is presented, so that the doctrines developed to govern inquiries into the presence of a claim for relief might be utilized, avoiding the more abstract and poorly focused decisions which the current approach causes. *See* Albert, *supra* note 17. Another suggests alternatives for determining what constitutes a judicially cognizable injury. *See* Note, *Recent Standing Cases and a Possible Alternative Approach,* 27 HASTINGS L.J. 213, 234 (1975). Professor Davis offers a list of fourteen propositions designed to simplify and systematize the law of standing. Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 628 (1968).

19. Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 24 n.28a (3d Cir. 1975); Connor v. Highway Truck Drivers & Helpers, Local 107, 378 F. Supp. 1069 (E.D. Pa. 1974), *modified,* 68 F.R.D. 370 (E.D. Pa. 1975); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973), *vacated sub nom.* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974); Albertson's Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43, 55 (D. Utah 1973), *aff'd in part, rev'd in part,* 503 F.2d 459 (10th Cir. 1974).

20. Of course, in class actions challenging agency or legislative activity as unconstitutional, concerns of separation of powers should play their normal role. *See, e.g.,* Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974). Even in those instances, however, the issue of whether the plaintiff has "standing" to sue as a class representative should be kept distinct from whether he has standing to bring the action. Thus, in *Schlesinger* the Supreme Court noted that the plaintiffs could maintain the representative action since their interest was "undifferentiated" from that of the other members, 418 U.S. at 217, but dismissed the suit because plaintiffs' failure to show a concrete injury meant that they lacked "citizen standing."

21. *See, e.g.,* White v. Deltona Corp., 66 F.R.D. 560 (S.D. Fla. 1975); Gordon v. Fundamental Investors, Inc., 362 F. Supp. 41 (S.D.N.Y. 1973); Albertson's, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43 (D. Utah 1973), *aff'd in part, rev'd in part,* 503 F.2d 459 (10th Cir. 1974).

22. *See, e.g.,* Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1975); Connor v. Highway Truck Drivers & Helpers, Local 107, 378 F. Supp. 1069 (E.D. Pa. 1974), *modified,* 68 F.R.D. 370 (E.D. Pa. 1975).

whether he is an adequate representative.[23] Focusing on the presence of a claim for relief or class membership also fails adequately to address the underlying concerns of the case and controversy requirement.[24] Rather, it is necessary to consider the policies behind this constitutional limitation in order to ascertain whether the class action may be brought. The remainder of this article will illustrate this proposition, analyzing first the constitutional and then the prudential elements of standing and mootness in rule 23 actions.

II. The Class Action as a Public Interest Suit

Before turning to the application of standing and mootness concepts in class actions, it is important to consider how the class action is related to the general public interest suit. There has always been public interest litigation in our society.[25] Originally, and most commonly, the term referred to suits challenging some governmental action as violative of the statutory or constitutional rights of a segment of the public. As corporations flourished in the business world, the term was expanded to embrace actions challenging private activity, but activity which, because of the size of big business, necessarily affected large numbers of citizens and thereby merited the "public interest" classification. Shareholder derivative suits, brought because of an alleged injury to the corporation through mismanagement by some members of the board of directors, fit this description in that they promote the public interest by protecting the rights of the shareholders and, even more generally, by deterring bad business practices and monitoring corporate activities.[26]

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23. *See* text accompanying notes 114-35 *infra.*

24. *See* text accompanying notes 42-44 *infra.*

25. A thorough discussion of the various types of public interest litigation may be found in Homburger, *supra* note 18.

26. The history of the shareholder derivative suit provides an interesting parallel to the current controversy surrounding class actions. Prior to the adoption of requirements limiting the powers of a shareholder to initiate and terminate such actions at will, stockholder suits invited abuse and strike suitism because the corporate defendants could buy off the plaintiff with a private settlement. However, these types of abuses, which are some of those alleged to pertain to class actions, were adequately curtailed by the adoption of federal rule 23 in 1938 [now federal rule 23.1] and comparable state legislation that established requirements designed to ensure that frivolous suits were not brought and that derivative actions were not settled in order to benefit the plaintiff only. *See* Haudek, *The Settlement and Dismissal of Stockholders' Actions,* 22 Sw. L.J. 767 (1968), 23 Sw. L.J. 765 (1969); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit,* 46 Yale L.J. 421 (1936). *See generally* 7A C. Wright & A. Miller, Federal Practice and Procedure §§ 1821-41 (1972).

Far more controversial and potentially more useful is the class action as a means of protecting the public interest. A class action is brought by one or more persons suing on behalf of themselves and other individuals who allegedly possess similar grievances. Conversely, an action may be brought against a group of individuals who, it is claimed, have in some similar way wronged the plaintiff. One rationale for allowing this representative proceeding is that the joinder of all the persons similarly situated to the representative would be "impracticable"[27] and that some procedure is necessary so that sheer numbers do not prevent the assertion of legal rights.[28] Thus, the device provides an efficient and economical means for the courts and the parties to try a case in which there are common interests.[29]

More than efficiency and judicial economy is served, however, and it is these added functions which merit the application of the term "public interest suit" to class actions.[30] Because of our mass economy, dominated by big businesses, monolithic governmental structures, and burgeoning bureaucracy, it is not unusual for the decision or practice of one government or corporate official to affect thousands or even millions of citizens. If that decision or practice is illegal or otherwise improper, all those persons will suffer. However, each individual may be able to prove only a small amount of actual damages, and individual statutory penalties may be small. For example, a lender's violations of the Federal Truth in Lending Act by failure to show the annual percentage rate on monthly bills merits only a $100 minimum penalty.[31] Clearly, this is not enough to provide incentive for most individuals to sue; and, should a few brave ideologists sue and win, the penalty does not impose enough of a burden on the defendant to encourage compliance with the statute.[32] Even in consumer antitrust

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27. Impracticability of joinder is currently embodied in federal rule 23(a)(1) as one of the necessary prerequisites for the maintenance of a class action. *See* 7 C. WRIGHT & A. MILLER, *supra* note 26, § 1762.

28. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

29.

> The King of Brobdingnag gave it for his opinion that, "whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together." In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before.

Chafee, *Bills of Peace with Multiple Parties,* 45 HARV. L. REV. 1297 (1932).

30. *Cf.* note 2 *supra.*

31. 15 U.S.C. § 1640(a)(2)(A) (Supp. IV 1974).

32. Class actions under the Truth in Lending Act have had mixed success. An

suits claiming overcharges or a conspiracy to fix prices, the individual frequently has too little at stake to merit bringing an action.[33] In the absence of a class action, the financial incentives for attorneys also are minimal. For example, in suits challenging the segregation of public school facilities, the amount of attorneys' fees awarded if brought by one student on his own behalf may be so small that few attorneys will be willing to conduct the litigation.

The class action fills this void.[34] By permitting all those similarly harmed to join in one suit, the aggregate amount of damages, penalties, or fees provides an incentive to sue and exerts a correlative deterrent effect on the defendant.[35] Deterrence is further increased since

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initial upsurge of suits was stemmed in 1972 when Judge Frankel held that the class suit was not a superior method of relief and, indeed, was inconsistent with the statutory remedy because the proposed recovery "of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant . . . ." Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972). Other courts noted that class actions were not necessary, since the Act provided for attorney's fees, as well as a minimum recovery, so that a sufficient incentive for individual suits was present. Mathews v. Book-of-the-Month Club, Inc., 62 F.R.D. 479 (N.D. Cal. 1974); Welmaker v. W.T. Grant Co., 365 F. Supp. 531 (N.D. Ga. 1972). A few other courts refused to reject automatically class actions under the statute. *See* Wilcox v. Commerce Bank, 474 F.2d 336 (10th Cir. 1973); Turoff v. Union Oil Co. of California, 61 F.R.D. 51 (N.D. Ohio 1973). These problems under the statute are examined in Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives,* 27 STAN. L. REV. 101 (1974). Finally, the statute was amended in 1974 to permit class actions, but recoveries are limited to the lesser of $100,000 or 1 percent of the creditor's net worth. 15 U.S.C. § 1640(a)(2)(B) (Supp. IV 1974).

33. *See In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 267 (S.D.N.Y. 1971); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 572 (D. Minn. 1968).

34. "The class action is one of the few legal remedies the small claimant has against those who command the status quo." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part); *accord,* Escott v. Barchris Const. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U.S. 816 (1965); Cappelletti, *supra* note 1, at 856; Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. OF LEGAL STUDIES 47 (1975).

35. The current status of attorney fee awards in class actions is somewhat unclear. Although attorneys' fees have been viewed as an incentive to sue, *see* note 132 *infra,* federal courts are becoming much more restrictive and demanding in an effort to protect the class action from becoming primarily a strike suit for large fees. *See, e.g.,* Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir.), *cert. denied sub nom.* Patlogan v. Dickstein, Shapiro & Galligan, 414 U.S. 1092 (1973); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1974), *aff'd,* 507 F.2d 1278 (5th Cir. 1975); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972). *See also* Manual for Complex and Multidistrict Litigation § 1.47 (1973 ed.). In addition, the Supreme Court's recent decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), may further limit the availability of awards. The *Alyeska* decision restricts the substantial benefit theory, which is a common approach utilized to award fees in class suits, to situations in which the benefit is readily measurable.

class suits often are newsworthy, in part simply because of the large numbers of persons involved. Thus, defendants concerned with their reputation will want to avoid conduct that might result in a class suit which could darken their public image. In this way, the class action fosters and protects the public interest by providing an incentive to "private attorneys general"[36] and discouraging conduct contrary to the public interest.

Two important distinctions between class and public interest suits should be noted. The most obvious is the difference in their breadth of subject matter: while class actions may be and frequently are brought to challenge governmental action, they also are available to attack private activities affecting large numbers of persons. Public interest suits, on the other hand, typically are limited to challenges to governmental activity.[37] The representative character of the actions also differs. In the class suit the representative is acting on behalf of a well-defined group of individuals,[38] and when a judgment is entered it will bind each and every member of that class.[39] Even though the plaintiff in a public interest suit is acting on behalf of the general public, his action binds no one; should he lose, some new representative may take up the staff and begin anew.[40] As will be shown, these distinctions are very important and explain in part why rigid standing and mootness rules are inappropriate in class actions.

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36. The phrase "private Attorney General" was first coined by Judge Jerome Frank in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated,* 320 U.S. 707 (1943).

37. One exception is the section of the Clean Air Act providing for suits by private individuals against "any person" violating the noise control standards of the statute. 42 U.S.C. § 4911(a)(1) (1972).

38. The existence of a distinct "class" for whom the representative acts is a necessary prerequisite to bringing a class action under federal rule 23. *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 26, at § 1760. Although the amount of detail necessary to define the class adequately depends on the facts of each case, sufficient information generally must be provided so that the court can determine whether a person should be considered a member. *See* Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); DeBremaecker v. Short, 433 F.2d 733 (5th Cir. 1970).

39. *See* FED. R. CIV. P. 23(c)(3); Hansberry v. Lee, 311 U.S. 32 (1940); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921).

Whether the broad binding effect of class action judgments may render them more easily susceptible to collateral attack is a question currently debated. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 HARV. L. REV. 589 (1974); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217 (1975).

40. Although res judicata principles do not prevent a second public interest suit based on the same challenge, stare decisis and the cost of litigation may, however, discourage relitigation as a practical matter.

III. Article III, Section 2 Limitations: Standing As Applied in Class Actions

In public interest litigation, the Supreme Court generally has defined standing in terms of a threshold inquiry into whether the claimant has suffered a direct or "actual injury," as opposed to a more "general" injury.[41] For constitutional purposes, the requirement of an "actual injury" assures that the judiciary perform only their proper role. By barring advisory opinions based on hypothetical questions,[42] and by allowing the courts to rule only when an actual controversy is present, the Constitution has limited courts to deciding questions presented in an adversary context—the form historically viewed as best suited to judicial resolution.[43] Focusing on adversariness also helps preserve the balance and separation of powers that typify the American system of government by three coordinate branches. The federal courts are prevented, as a jurisdictional matter, from deciding issues that because of their speculative character or lack of concreteness involve political judgments that might better be resolved by the legislature or by the executive.[44] Consequently, the focal point for proper judicial intervention is some real injury which has occurred or is imminent. If this is present, then adjudication is appropriate.

Against this background, the major question in class action litigation is whose claim should be examined to determine whether the suit is within the scope of the federal courts' judicial power. Is it sufficient to show that the representative has been injured, even if the class has not? Can a Black job applicant, allegedly denied employment

41. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

42. *See* United States v. Fruehauf, 365 U.S. 146 (1961); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938). *See generally* C. Wright, Federal Courts 41 (3d ed. 1976).

43. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970); Flast v. Cohen, 392 U.S. 83, 95 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

44. As stated by Mr. Chief Justice Warren in Flast v. Cohen, 392 U.S. 83, 94-95 (1968):

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

The dual function of the case or controversy requirement is also explored in Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 221-22 (1974).

because of discriminatory hiring practices, bring suit on behalf of a class including future applicants? Alternatively, can an action be brought in federal court when the class claim falls within article III, even though the plaintiff representative's claim is deficient, as is the case when the suit involves plaintiff and defendant classes and the representative necessarily has been injured by only one or a few of the defendant class members?

A. *Allowing the Representative to Satisfy the Requirement*

Insofar as standing is viewed as a jurisdictional prerequisite, some courts have held, relying on the Supreme Court's decisions in *Snyder v. Harris*[45] and *Zahn v. International Paper Co.*,[46] that each and every member of the class must have standing because to hold otherwise would be an expansion of the traditional concept of a "case."[47] However, this is an overly broad application of those two cases. In both *Snyder* and *Zahn* the Supreme Court's reluctance to interpret "case" broadly was not in deference to constitutional limitations. Rather, it expressed concern that the issue involved, the statutory amount-in-controversy requirement, historically had been treated narrowly,[48] and to hold differently would be to overlook years of precedent in analogous cases involving multiple parties.[49] No such narrow precedent exists with regard to the article III, section 2 requirement.

A far better analogy is the application of the diversity requirement,[50] also of constitutional origin, to class actions. Here it has been held that diversity may be satisfied by reference solely to the representative's citizenship,[51] partly in recognition that to require complete diversity could destroy the class action.

A similar approach with regard to the case or controversy element of standing seems warranted. To require the class representative to

45. 394 U.S. 332 (1969).

46. 414 U.S. 291 (1974).

47. *See* Vietnam Veterans Against the War v. Benecke, 63 F.R.D. 675 (W.D. Mo. 1974); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); *cf.* Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975).

48. 394 U.S. at 338-40.

49. 414 U.S. at 294-95.

50. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (1970).

51. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Friedman v. Meyers, 482 F.2d 435 (2d Cir. 1973); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970); Day-Brite Lighting Div. v. International Bhd. of Elec. Workers, 303 F. Supp. 1086 (N.D. Miss. 1969). *See also* Snyder v. Harris, 394 U.S. at 340, where the Court assumed that only the representative's citizenship is relevant for diversity purposes.

show that every class member's claim presents an actual controversy would place a formidable, if not insurmountable, threshold burden on the courts and parties. Moreover, since by definition the joinder of the other class members is impracticable, to require proof of the existence of individualized "cases" would in essence be treating the class members as parties. To do that is inconsistent with the representative character of the proceedings. As long as the representative can show an actual injury, the court need have no concern about rendering an advisory opinion, since it is clear that there is an actual and immediate controversy meriting its attention.[52] The threshold requirement is met.[53]

Allowing the class representative's claim to satisfy the constitutional aspects of standing also finds support in the Supreme Court's treatment of *jus tertii* claims in general public interest litigation.[54] Although the Court has held that standing may be found only on the basis of a claim that a particular statute or act violates the rights of the plaintiff, there are several cases in which the plaintiff has been permitted to maintain an action alleging that a particular law injures him as well as third persons not before the court.[55] The litigant is allowed to press the rights of those third persons because he has a proper claim himself,[56] there is some relationship between him and those whom he seeks to protect,[57] and the Court perceives that the only way in which those third-party rights will be protected adequately is through such a representative proceeding.[58] The important thing to note about this line of cases is that the Supreme Court has not treated as a constitutional issue the question of whether *jus tertii* should be permitted in a particular action, but has handled the question as a matter of discretion.[59] Similarly, once the class representative demon-

52. *See* Baird v. Lynch, 390 F. Supp. 740 (W.D. Wis. 1974).

53. The fact that the court need not look to each class member's claim in order to assure that article III, § 2 is satisfied does not mean that the question whether the class members have actually suffered an injury is irrelevant. Rather, that issue may be considered when deciding how to define the class, *see, e.g.*, Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975), or on a subsequent motion for summary judgment.

54. *See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

55. *See* cases cited note 57 *infra*.

56. The absence of a personal claim necessitates dismissal. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

57. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953).

58. *See* cases cited note 57 *supra*.

59. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court referred to its general

strates that his claim falls within article III, section 2, it should be within the trial court's discretion to allow the action to proceed as a class suit. A female employee challenging discriminatory employment practices clearly has standing to sue on behalf of future employees if she has been harmed.[60] Whether she should be allowed to represent those individuals is a discretionary matter to be decided in light of the policies and requirements of rule 23.

B. *Allowing the Class to Satisfy the Requirement*

The converse question, whether the class claim, rather than the representative's claim, can be allowed to satisfy the standing requirement, has posed much more difficulty for the federal courts. Arguably, as long as an actual controversy between the class and the opposing party is presented, article III, section 2 should not present a barrier to the institution of a federal class action. If the class claim presents a case or controversy or if unnamed class members clearly have been injured, the representative's failure to show individual harm should not present a constitutional problem. Rather, it should be considered in determining his fitness under the requirements of rule 23.

Despite the seeming logic of this conclusion, the use of class standing as the sole basis for instituting an action has been rejected by the courts.[61] To avoid dismissal based on a lack of standing, the named

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rule forbidding the assertion of third-party rights as "self-imposed," pointing to instances in which it had been relaxed. *Id.* at 444.

60. *See, e.g.*, Guse v. J.C. Penney Co., 409 F. Supp. 28 (E.D. Wis. 1976). *See also* cases cited note 15 *supra.*

61. *See* Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1975); Chevalier v. Baird Sav. Ass'n, 66 F.R.D. 105 (E.D. Pa. 1975); Leonard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 64 F.R.D. 432 (S.D.N.Y. 1974); Black Bros. Combined of Richmond, Inc. v. Richmond, 386 F. Supp. 147 (E.D. Va. 1974); Kister v. Ohio Bd. of Regents, 365 F. Supp. 27 (S.D. Ohio 1973), *aff'd*, 414 U.S. 1117 (1974); Husbands v. Pennsylvania, 359 F. Supp. 925 (E.D. Pa. 1973); Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973).

On the other hand, actions between plaintiff and defendant classes have been permitted—thus necessarily approving class standing—when the defendants are officials or instrumentalities of a single state or governmental unit charged with uniformly applying a statute or regulation. *See, e.g.*, Hopson v. Schilling, 418 F. Supp. 1223, 1238 (N.D. Ind. 1976); Samuel v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972). However, these cases are only of marginal precedential value since, as expressed by one court:

> In such a case an action against the defendant class is simply a procedural alternative to challenging the constitutionality of the statute by suit against the state directly—a procedural device perhaps sometimes required by the legal fictions surrounding the interplay in the case law between the Eleventh Amendment and the doctrine of *Ex parte* Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Mudd v. Busse, 68 F.R.D. 522, 528 (N.D. Ind. 1975).

representative must show that he has suffered or is in immediate danger of sustaining some personal injury.[62] While the imposition of this requirement on the class representative appears unnecessary in view of a viable class claim for relief, it is consistent with the Supreme Court's continued rejection of the ideological plaintiff in general public interest suits.[63] Moreover, although the Court's rejection of class standing can be deplored, it appears to be so firmly entrenched that arguments to the contrary would be futile at this time. Those decisions do not foreclose another line of development, however. Class standing clearly remains as a possibility in cases between plaintiff and defendant classes in which the representative can claim an injury, but the injury was inflicted by only one defendant class member, not by each individual in the class. Two companion cases arising in the Ninth Circuit, *La Mar v. H & B Novelty & Loan Co.*, and *Kinsling v. Allegheny Airlines*,[64] illustrate the problem.

In *La Mar* the plaintiff represented a class of consumers who were customers of a class consisting of all the pawnbrokers licensed to do business in Oregon. Plaintiff sought $100 per customer or double the finance charges for alleged violations of the Federal Truth in Lending Act. Plaintiff representative was injured by, and thus could present an actual controversy with regard to, only one of the defendants. *Kinsling* involved a suit under the Federal Aviation Act by a class of airline passengers claiming that defendant class members had all violated the statute by overcharging for connecting flights. Again, plaintiff had been overcharged by only one of the airlines in the defendant class and did not have a personal claim with regard to the other defendant class members. "Class standing" was necessary for continued maintenance of the suit.

Judge Sneed, writing for the appellate court, expressed great concern that the class action was threatening to change the traditional role of the judiciary, shifting the balance of power from the administrative process to the courts. In addition, he noted the large numbers of class actions flooding the courts, the possible strike-suit potential of the device, and the potential burden on the defendants of enormous class recoveries for technical statutory violations. Faced with similar

62. *See* O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Urban Contractors Alliance v. Bi-State Dev. Agency, 531 F.2d 877 (8th Cir. 1976). *But cf.* Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976).

63. *See* note 16 *supra.*

64. 489 F.2d 461 (9th Cir. 1973).

circumstances, other courts had suggested that article III, section 2 should be used as a means of limiting or restricting class suits.[65] However, Judge Sneed refused to hold that standing was lacking and recognized that the presence of a case or controversy must be tested against the background of the entire action:[66]

> No one contends, of course, that there is no case or controversy between the defendants who seek in these cases to be dismissed and their customers. The issue upon which we turn these cases is whether the plaintiff in each case can represent such customers under Rule 23.[67]

The Ninth Circuit's rejection of the attempt to add standing as another preliminary, complex issue in class action litigation can only be applauded. Furthermore, the decision recognizes quite properly that by and large the case or controversy requirement should not pose any threshold problems in class actions between plaintiff and defendant classes. In those instances the court need not worry that the issues lack concreteness or that the parties are not adverse, since those requirements are clearly satisfied by the representative's individual claim. Rather, the appropriate concern is whether the plaintiff, having such a limited interest, will represent the other class members adequately.[68] A parallel analysis can be applied to the related doctrine of mootness.[69]

IV. Article III, Section 2 Limitations: Mootness As Applied in Class Actions

In public interest suits, the plaintiff must show not only an actual controversy at the outset, but also a "live" case throughout the litigation.[70] If the conduct that is being challenged has ceased, or the plain-

65. *E.g.*, Mudd v. Busse, 68 F.R.D. 522, 527 n.1 (N.D. Ind. 1975).

66. *See* Baird v. Lynch, 390 F. Supp. 740 (W.D. Wis. 1974); Haas v. Pittsburgh Nat'l Bank, 60 F.R.D. 604 (W.D. Pa. 1973). On appeal from a decision later in the Haas case, the Third Circuit also approved the two-part approach taken in *La Mar*. Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1088 (3d Cir. 1975). *See also* Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973).

67. 489 F.2d at 464.

68. *See* text accompanying notes 114-36 *infra*.

69. The mootness and standing doctrines are analogous in many respects. Indeed, it has been suggested that mootness is "the doctrine of standing set in a time frame." Monaghan, *supra* note 10, at 1384. Nonetheless, there are some definite differences in the way in which the Supreme Court has treated mootness questions. *See generally* 13 C. Wright, A. Miller & E. Cooper, *supra* note 16, § 3533; Note, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 376-77 (1974).

70. Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974).

tiff's individual claim has been satisfied, then any decision by the court will be advisory[71] and outside the permissible scope of judicial power under article III, section 2. The action must be dismissed as moot even though other members of the public may continue to be injured by the defendant's conduct.

By contrast, prior to 1975 the courts generally held that the fact that the representative's claim became moot did not necessitate the dismissal of a class action.[72] The courts implicitly recognized the distinction between class actions and other public interest suits. However, little attempt was made to explain the result reached; the courts seemed to be acting in recognition of the need for expanded treatment without analyzing why it was proper. In 1975, the Supreme Court finally attempted to set some guidelines that the lower courts might follow in applying the doctrine of mootness to class actions.[73] That decision sets the stage for future developments in the class action field.

A. *The Class Given Separate Status*

Sosna v. Iowa[74] involved a constitutional challenge to a state statute requiring one year's residency within the state before an individual

71. Preiser v. Newkirk, 422 U.S. 395, 401 (1975); North Carolina v. Rice, 404 U.S. 244, 246 (1971); Benton v. Maryland, 395 U.S. 784, 788 (1969).

72. *See, e.g.,* Doe v. Mundy, 514 F.2d 1179 (7th Cir. 1975); Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974); Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973); Conover v. Montemuro, 477 F.2d 1073 (3rd Cir. 1973); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Hurley v. Van Lare, 380 F. Supp. 167 (S.D.N.Y. 1974), *vacated and remanded on other grounds,* 421 U.S. 338 (1975). For an analysis of several pre-1975 decisions, see Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative,* 1974 DUKE L.J. 573.

73. *See* Sosna v. Iowa, 419 U.S. 393 (1975). *Sosna* actually was not the first class action case to present a mootness problem to the Supreme Court. In Richardson v. Ramirez, 418 U.S. 24 (1973), the Court denied a mootness claim in a California state class action brought by three ex-felons on behalf of all other ex-felons similarly situated. The plaintiffs sued three county election officials as representatives of all other such officials challenging the constitutionality of their disenfranchisement under California law. The defendants had agreed to allow the named plaintiffs to register to vote. The California court ruled that the action could continue even though those plaintiffs no longer were members of the class they sought to represent. The Supreme Court affirmed on the ground that a live controversy still remained, 418 U.S. at 34-36, and that "California is at liberty to prescribe its own rules for class actions . . . ." *Id.* at 39.

Similarly, in Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972), and Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 126 (1974), class actions were allowed to proceed even though the named plaintiffs' claims had become moot. In those cases, however, the Court focused on the issue, rather than the class aspects of the actions, finding in both cases that it would be "capable of repetition, yet evading review" unless a decision were rendered.

74. 419 U.S. 393 (1975).

could obtain a divorce or legal separation there. Plaintiff, who had been in the state for one month, sued on behalf of herself and all others similarly situated.[75] Although the plaintiff had not satisfied the durational residency requirement at the time the trial court rendered its decision, her claim was moot by the time the case reached the Supreme Court.[76] In an opinion by Mr. Justice Rehnquist, the Court held that the action could continue and that a live controversy was present.

The Court's decision was based on two findings, both of which support a functional approach. First, the Court found that, despite the mootness of the plaintiff's claim, a case still was present involving the other class members and the state. If plaintiff had sued only on her own behalf, dismissal of the suit would have been necessary, even though other persons in Iowa might be subject to the allegedly unconstitutional requirement. However, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."[77] One of the things which gave the class this separate status was the fact that the unnamed members would be bound by the judgment.[78] Thus, the Court explicitly recognized that class actions should be treated differently from other public interest suits and that the class, as a whole, may meet the case or controversy requirement.

The second factor on which the Court relied was the need for judicial intervention in cases in which the issue—for example, a challenge to the constitutionality of a short statutory durational requirement—would otherwise escape full appellate review because of the slowness of the judicial process. This factor had already been considered in previous Supreme Court decisions which allowed an exception to the mootness doctrine for cases in which the plaintiff might again be subject to the challenged conduct.[79] In *Sosna* the exception was expanded to cover cases in which the other non-party class mem-

75. Plaintiff described the class as " 'those residents of the State of Iowa who have resided therein for a period of less than one year and who desire to initiate actions for dissolution of marriage or legal separation, and who are barred from doing so by the one-year durational residency requirement embodied in Sections 598.6 and 598.9 of the Code of Iowa.' " 419 U.S. at 397.

76. *Id.* at 398.

77. *Id.* at 399.

78. *Id.* n.8.

79. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911).

bers were or could be affected by defendant's activities.[80] However, as explained in a more recent decision,[81] the Court's use of this second factor was merely to demonstrate that *Sosna* was consistent as a matter of policy with its earlier mootness decisions.[82] A demonstration of the need for review is not necessary to allow a class action to continue, since, "[g]iven a properly certified class action, *Sosna* contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill this function exists."[83]

A strong dissent[84] by Justice White points out just how far-reaching *Sosna* might be. As he notes, the traditional function of the case or controversy requirement was to weed out those cases brought by persons having no personal stake in the outcome. By failing to dismiss in *Sosna,* the Court allowed a new type of suit to be entertained in the public interest, expanding the limited class of cases that typically have been permitted:

> The unresolved issue, the attorney, and a class of unnamed litigants remain. None of the anonymous members of the class is present to direct counsel and ensure that class interests are being properly served. For all practical purposes, this case has become one-sided and has lost the adversary quality necessary to satisfy the constitutional "case or controversy" requirement. A real issue unquestionably remains, but the necessary adverse party to press it has disappeared.[85]

There is no doubt that Justice White is correct in his assessment that *Sosna* marks an endorsement of the class action as a public interest suit—an endorsement all the more bewildering against the background of recent Supreme Court decisions restricting the maintenance of federal class actions.[86] In addition, the balance of power may

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80. The injection of this second factor into the mootness inquiry is severely criticized in 13 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 16, § 3533, at 82-83 (1976 Supp.).

81. Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976).

82. *Id.* at 1260 n.8.

83. *Id.* at 1260.

84. 419 U.S. at 410.

85. *Id.* at 412.

86. The first limitation on federal class actions was the Supreme Court's ruling that each member of the class must satisfy the statutory amount in controversy requirements. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). The availability of federal class action relief was further restricted in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which held that federal rule 23(c)(2) requires individual notice to all identifiable class members, that

be altered somewhat because some of the cases that now may be permitted previously would have been handled by the political process.[87] However, the fact that the balance of power is being readjusted and that more cases are being litigated in the federal courts does not of itself mean that the case or controversy limitation has been ignored.

Article III, section 2 does not establish any precise rule as to what constitutes a case or controversy.[88] Instead, the requirement has been interpreted flexibly, taking into account whether the issue presented is one best suited to judicial resolution or one that should be left to the political process.[89] Moreover, as already has been illustrated, since a live, concrete controversy must be present in the claims of the other class members, there need be no concern about rendering an advisory opinion. If the claims of the other members of the class also are moot, of course the action will have to be dismissed.[90] The objections voiced by the *Sosna* dissent pertained to whether the plaintiff was an adequate representative in light of her moot claim, not whether the case was within the permissible scope of federal judicial power.

B. *The Importance of Class Certification*

Although *Sosna* firmly establishes the unique characteristics of the class action that justify its special treatment when mootness is at issue, it is unclear just how far this interpretation of the case or controversy requirement can be carried. In *Sosna* itself the action had been certified as a proper class action under federal rule 23.[91] Consequently,

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a preliminary hearing to determine how to allocate the costs of notice is improper, and that the plaintiff is required to absorb the entire cost of sending notice even if that cost would be prohibitive and result in the suit being abandoned.

87. *See* Monaghan, *supra* note 10, at 1383. *See also* Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

88. A good example of the flexibility of the article III restrictions generally is the judicially developed doctrine of pendent jurisdiction. *See* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Under that doctrine, the federal courts are permitted to decide claims based solely on state law and not falling within their constitutionally established jurisdictional scope. As the Supreme Court noted in Rosado v. Wyman, 397 U.S. 397, 405 (1970), the rationale for this expansion of jurisdiction is simply "the commonsense policy" of "the conservation of judicial energy and the avoidance of multiplicity of litigation."

89. *See* note 16 *supra*.

90. *See, e.g.*, Hall v. Beals, 396 U.S. 45 (1969).

91. There have been several cases subsequent to *Sosna* in which class certification took place and the action was allowed to proceed after the representative's claim became moot. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Doe v. Mundy, 514 F.2d 1179 (7th Cir. 1975); Tucker v. City of Montgomery Bd. of Comm'rs. 410

various alternative protections provided in the rule ensured that the case was presented in a truly adversarial manner.[92] What should be the result if certification has not yet taken place when the representative's claim becomes moot? Should the action be treated as an individual public interest suit until certified under rule 23, with the result that mootness of the plaintiff's claim requires dismissal?

There are several reasons for treating the suit as a class action, when it has been pleaded as such, even before certification. The fact that the action has not yet been properly certified does not mean that it is not a proper class action.[93] Indeed, the various protective procedures available in the class action rule will be utilized until certification is denied.[94] Federal rule 23(c)(1) merely urges the court to decide the class issue "as soon as practicable" after the commencement of the action.[95] In some cases discovery may be necessary to decide how to describe the class properly.[96] In others, the class issue may be intertwined with the merits and may be postponed until some later stage in the proceedings.[97]

F. Supp. 494 (M.D. Ala. 1976); Torres v. Butz, 397 F. Supp. 1015 (N.D. Ill. 1975); Plato v. Roudebrush, 397 F. Supp. 1295 (D. Md. 1975). *See also* Cruz v. Hauck, 515 F.2d 322, 325 n.1 (5th Cir. 1975) (parties treated case as though a proper certification had been made).

92. *See* text accompanying notes 114-35 *infra*.

93. It has been suggested that a rule of presumptive validity of class actions should apply until an adverse determination is made under rule 23(c)(1). 3B J. MOORE, FEDERAL PRACTICE ¶ 23.50 (2d ed. 1975); Bledsoe, *supra* note 4, at 447.

94. For example, under rule 23(e) notice and court approval are required for any proposed settlement of a class action. It has been held that these requirements pertain even prior to any rule 23(c)(1) determination so as to prevent strike suits and to ensure that the interests of the absent members are protected. *See* Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969).

95. Although the courts have recognized the need for an early determination, *see, e.g.*, Berland v. Mack, 48 F.R.D. 121, 126 (S.D.N.Y. 1969), certification has been delayed as much as one year after the filing of the complaint, *see* Souza v. Scalone, 64 F.R.D. 654 (N.D. Cal. 1974), and has even been considered for the first time on appeal, *see* Locke v. Board of Pub. Instruction, 499 F.2d 359 (5th Cir. 1974). *But see* Raschio v. Sinclair, 486 F.2d 1029 (9th Cir. 1973).

96. *See, e.g.*, Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).

97. In Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), the Court of Appeals postponed the class determination until after liability had been decided in order to save the judicial system the time and expense of dealing with the various class action questions and procedures. The result of the court's decision is to turn the class action into a test case unless or until plaintiffs win on the merits. Thus, *Katz* can be criticized as not complying with the rule 23(c)(1) directive, but instead determining the class issue "as soon as is necessary."

Perhaps in recognition of some of these possibilities, the *Sosna* Court stated that if the plaintiff's claim became moot "before the district court can reasonably be expected to rule on a certification motion," certification might relate back to the filing of the complaint.[98] This decision to allow relation back was made as a matter of policy, in order to avoid a situation in which an issue would always be capable of evading review.[99] The loophole allows the courts seriously to evaluate the propriety of permitting the suit to continue as a class action despite the fact that the representative's claim became moot after the action was filed. If it is clear that the class action allegations were pleaded in good faith and that the failure to achieve class certification earlier is not due to any fault of the plaintiff, the court seriously should consider whether to allow the action to proceed under rule 23 and should not dismiss it as moot. As recognized by the Supreme Court, the decision to allow certification to relate back "may depend upon the circumstances of the particular case."[100]

Despite the soundness of the above approach, its viability is somewhat in doubt because of *Board of School Commissioners v. Jacobs*,[101] a per curiam decision rendered by the Supreme Court shortly after *Sosna*. In that case plaintiffs brought a class action on behalf of all high school students attending schools managed by the Board. Plaintiffs claimed that certain rules and regulations interfered with the publication and distribution of their student newspapers, in violation of the first and fourteenth amendments. Apparently no class action hearing was held, although the district court in its ruling on the permanent injunction, stated that "the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect."[102] By the time the case reached the Supreme Court, the representatives had graduated and the Court held, citing *Sosna*, that because "there was inadequate compliance with the requirements of rule 23(c), we have concluded that the case has become moot."[103]

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98. 419 U.S. at 402 n.11.

99. *Id., accord,* Naper v. Gertrude, 542 F.2d 825 (10th Cir. 1976); Williams v. Wholgemuth, 540 F.2d 163 (3d Cir. 1976); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975); Andujar v. Weinberger, 69 F.R.D. 690 (S.D.N.Y. 1976); Moore v. Matthews, 69 F.R.D. 406 (D. Mass. 1975).

100. 419 U.S. at 402 n.11.

101. 420 U.S. 128 (1975).

102. 349 F. Supp. 605, 611 (S.D. Ind. 1972).

103. 420 U.S. at 129. A later case to similar effect is Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976).

Interpreted most restrictively, *Jacobs* seems to lay down a hard and fast rule: only actions that have been properly certified under rule 23(c)(1) can be allowed to continue after the representative's claim has become moot. Several lower courts, relying on *Jacobs,* have ruled accordingly.[104] This conclusion is buttressed by the Court's failure, in its brief opinion, even to consider the possibility that certification might relate back.

The decision need not, indeed should not, be read so broadly. *Jacobs* presented a situation that would not have permitted relation back to operate,[105] since a final judgment had been entered by the trial court without a formal class determination. The plaintiffs' claims did not become moot before there was an opportunity to rule on the class question. Rather, the lower court appears largely to have ignored the issue. By failing adequately to identify and describe the class, the court left open the possibility that it would be treated as an individual suit on appeal.[106] In that sense, *Jacobs* stands as a warning to district judges not to engage in sloppy practices in the future.[107] If the representative's claim becomes moot at the trial level before the court has had an opportunity to make its rule 23(c)(1) decision, the judge should not feel constrained by *Jacobs* but should consider whether approval of class status is appropriate, thereby avoiding dismissal.[108]

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104. *See* Bradley v. Housing Authority, 512 F.2d 626 (8th Cir. 1975); McCleary v. Realty Indus., Inc., 405 F. Supp. 128 (E.D. Va. 1975); Leonhart v. McCormick, 395 F. Supp. 1073 (W.D. Pa. 1975); Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1975). *But cf.* Allen v. Likins, 517 F.2d 532 (8th Cir. 1975), in which the court dismissed the suit but suggested that if the failure to certify before plaintiff's claim became moot had been due to the court's dilatoriness, dismissal might not be required.

105. It is worth noting that not only had the named plaintiffs graduated, but the publication that originated the dispute between the students and the Board was no longer in existence. 420 U.S. at 133 (Douglas, J., dissenting).

106. Rule 23(c)(3) requires that "[t]he judgment in an action maintained as a class action . . . shall include and describe those whom the court finds to be members of the class."

107. *See* 420 U.S. at 133 (Douglas, J., dissenting). *See also* Baxter v. Palmigiano, 96 S. Ct. 1551, 1554 n.1 (1976).

108. *See* Lugo v. Dumpson, 390 F. Supp. 379 (S.D.N.Y. 1975). In Cicchetti v. Lucey, 514 F.2d 362, 367 (1st Cir. 1975), the court of appeals recognized that a class action might continue prior to certification but after the plaintiff's claim had become moot. However, it held that the case before it did not fall into that exception, as the issue involved was not one that otherwise would evade review. This case is now clearly wrongly decided in light of Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976).

Of course, the court when deciding whether to approve class status under these circumstances can utilize any of the tools provided in rule 23 to give added protection against abuses. *See* text accompanying notes 124-28 *infra.* For example, in one pre-*Sosna* case, the court ruled that the action would be dismissed without prejudice

Allowing the district court this discretion is essential if defendants are to be prevented from buying off plaintiffs by settling their individual claims before the action is properly certified. Fears of such tactics are not chimerical. For example, in one case the plaintiffs brought a class action on behalf of public housing applicants who had been denied housing because of allegedly discriminatory policies that favored higher-income applicants. Defendants gave apartments to the named plaintiffs and then moved to dismiss the case as moot since no certification order had been entered. The appellate court upheld the trial court's dismissal relying on *Jacobs,* even though it found that "[i]n the instant case it is true that the district court failed to take action on the plaintiffs' motions relating to the certification of the class. In addition it is conceded that the defendants deliberately mooted the issue as to the named plaintiffs or intervenors to avoid judicial review."[109]

In sum then, it is clear that with regard to questions of mootness, the unique characteristics of the class action *may* permit it to continue even though the named plaintiff no longer possesses a live grievance. Whether dismissal is governed solely by the fact of a formal rule 23(c)(1) determination prior to the plaintiff losing his claim or by other, more flexible, factors is an open question. The better decision is to allow the district court some discretion to permit certification to relate back when the failure to obtain an earlier determination was not due to the failure of the plaintiff to raise the question and when the issue presented is one that might otherwise evade review.

C. *Mootness and Standing Compared*

Even a cursory comparison of the treatment of mootness and standing in class actions reveals that the Supreme Court has been much more willing to accept the notion of independent class status as satisfying article III, section 2 constraints when the question is whether the action should be dismissed for mootness. On its face this difference in treatment appears somewhat anomalous. If both requirements are designed to ensure the presence of a live controversy, why is the class allowed to satisfy this concern in one instance, but not in the other?

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unless, within a specified period, other class members with live claims sought to intervene. LaReau v. Manson, 383 F. Supp. 214 (D. Conn. 1974).

109. Bradley v. Housing Authority, 512 F.2d 626, 629 (8th Cir. 1975). A similar situation arose in McCleary v. Realty Indus., Inc., 405 F. Supp. 128 (E.D. Va. 1975).

The answer lies, at least in part, in the different timing of the standing and mootness issues. As one commentator has noted,

> In mootness cases . . . the fact that standing once existed indicates both that some resources have probably been invested and that a factual situation which can be effectively adjudicated is present; indeed, when a mootness issue arises only after a trial has been held, the investment is plain, and the existence of a full record for the appellate court ensures factual concreteness.[110]

On the other hand a court confronted by a standing challenge at the outset of the litigation may be legitimately concerned that the issues lack concreteness and, having invested little energy to date, the court may have no good reason to allow the action to continue. Thus, the fact that an expanded notion of class status is proper when mootness is raised does not necessarily mandate the same treatment when standing is at issue. Of course, arguments supporting like standards for both doctrines can be made, but the courts must recognize the need to foster class actions as public interest suits. Unlike the situation in the typical public interest suit, the plaintiff representative in a class action does have a claim against at least one of the defendants and other live grievances are presented by the other class members, thereby assuring factual concreteness.

The question of whether standing is to be resolved in favor of the class or against it—that is, whether article III, section 2 is to be interpreted liberally or restrictively—is entwined with the ideological struggle currently taking place in the courts concerning the proper role for the judiciary in these rapidly changing times.[111] References to the Supreme Court's most recent standing cases indicate a desire to retreat from an activist role and to leave doubtful matters to be settled by the political process.[112] Indeed, the Court has specifically rejected the argument that if the plaintiff is not allowed to litigate the issue, no one can do so.[113] However, the Court has not abandoned the public interest litigant. In *Sosna* and other recent mootness cases, it has interceded even though well-established loopholes existed. It remains to be seen whether a permanent balance has been struck or

110. Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 376-77 (1974).

111. *See* note 1 *supra.*

112. *See* note 16 *supra.*

113. United States v. Richardson, 418 U.S. 166, 179 (1974).

whether the Court still may be persuaded to reject a rigid standing barrier, at least in plaintiff-defendant class suits.

V. Adequacy of Representation and Federal Rule 23

Without doubt, the expanded treatment just suggested for the application of the case or controversy requirement results in much greater emphasis being given to the adequacy-of-representation element of standing and mootness. That requirement provides the primary means for sifting out undesirable suits and generally controlling class actions.[114] However, the fact that satisfaction of the rule's requirements may have increased importance does not mean that they must be applied rigidly. The many protections for the nonparties' interests provided in rule 23 itself allow a more expanded notion of what constitutes an adequate representative than might be proper in a general public interest suit. Thus, the fact that the representative no longer has a claim for relief, or has a claim, but only against one member of the defendant class, does not necessarily mean that he cannot adequately protect the interests of the class members. His competence must be evaluated in light of the various other means at the court's disposal to assure that those interests are safeguarded. It is the presence of these other protections that may permit the non-Hohfeldian plaintiff to continue a class suit[115] and the absence of these same protections in other public interest litigation that bars the pure ideologist from the federal courts. Consequently, a brief look at rule 23 and its requirements is now in order.

The drafters of amended rule 23 attempted to provide a functional, pragmatic approach to the determination of whether a class action is maintainable.[116] In addition, in order to ensure the binding effect of any judgment in the action, they included a number of prerequisites designed to make certain that there was adequacy of repre-

114. Sosna v. Iowa, 419 U.S. 393, 403 (1975).

115. The special interest of the ideological (non-Hohfeldian) plaintiff in pursuing a class action even after his personal claim is moot must be examined carefully. Professor Degnan argues that decisions permitting civil rights plaintiffs to continue may not be good authority for a court faced with a consumer action, since those cases "are manifestations of zeal and dedication to a cause that transcends the individual interest of the class representative." Degnan, *Foreword: Adequacy of Representation in Class Actions,* 60 Calif. L. Rev. 705, 714-15 (1972).

116. Fed. R. Civ. P. 23, Advisory Committee's Note (Proposed Amendments to Rules of Civil Procedure for the United States District Courts), *reprinted in* 39 F.R.D. 69, 99 (1966).

sentation and that due process concerns were met. These requirements also protect the concerns typically regulated by standing and mootness, in that they ensure that the suit really is in the interest of the class and that the plaintiff is the proper party to represent that interest.

The plaintiff, by showing that the joinder of all the other class members would be impracticable (23(a)(1)), that questions of law or fact common to the class exist (23(a)(2)), and, in suits under rule 23(b)(3), that the class suit is superior to other means of relief, amply demonstrates that the suit is in the public interest. By definition, large numbers of the public allegedly have been harmed by a similar scheme or conduct and the class suit presents the best, if not the only, way of providing effective relief. The requirements that the representative have claims typical of the other class members (23(a)(3)) and that there be adequacy of representation (23(a)(4)) ensure that the plaintiff is the proper party to bring suit. The addition of standing and mootness requirements to this already complex scheme adds little. Moreover, to the extent that it further complicates the suit with additional preliminary determinations, it impedes or thwarts the public interest.

As should be obvious, adequacy of representation under rule 23(a)(4) is the key factor for determining whether a class action should be allowed to continue when the representative's claim is in some way different from those of the other members. The general test applied is whether the representative possesses characteristics that will assure the vigorous prosecution or defense of the action.[117] To that end, courts have ruled that the representative's interest cannot conflict with the interest of the other class members[118] and that he must be a member of the class he is seeking to represent.[119] In this way his interest is assured and the rejection of purely ideological plaintiffs is the same as in other public interest suits.

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117. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973); Hohmann v. Packard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1968); *In re* United States Financial Sec. Litigation, 69 F.R.D. 24, 36 (S.D. Calif. 1975); Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

118. *See, e.g.*, Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463 (10th Cir. 1974); Schy v. Susquehanna Corp., 419 F.2d 1112, 1116 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 26, § 1768.

119. *See, e.g.*, Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1077 (10th Cir. 1975); Wells v. Ramsay, Scarlett & Co., 506 F.2d 436, 437 (5th Cir. 1975); Garrett v. Hamtramck, 503 F.2d 1236, 1245 (6th Cir. 1974).

At first glance, the class membership requirement seems to achieve the same result that would be achieved by the use of the standing doctrine—that is, if the plaintiff is not a member of a class of injured persons, if he has not suffered the same injury, the suit must be dismissed.[120] If this is so, then one might properly wonder if we are not merely substituting the term "member" for "standing" and ask what is gained by changing the terminology. Although several courts appear to have fallen into this trap,[121] it is submitted that the requirement of class membership means something other than the presence of a legal injury and should be interpreted and applied to achieve its limited purpose.

Membership in the class demonstrates that the representative has a grievance such that his successful prosecution of the action on behalf of the class necessarily will redound to his own benefit. However, as a requirement designed to foster adequacy of representation, it need not mean that the representative must possess a claim exactly like that of the other members.[122] Rather, the emphasis should be on whether his position is similar to that of the absentees. Consequently, in answering the question whether the representative is a class member, the court might properly focus on the typicality requirement of 23(a)(3), defining a typical claim as one similar to, but not necessarily co-extensive with, the claims of the other class members.[123]

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120. In Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 216 (1974), the Court noted that "[t]o have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents...." This language is particularly unfortunate in that it appears to suggest a very rigid membership requirement. However, it should not be applied too literally, since in *Schlesinger* itself the Court found the representative's interests to be undifferentiated from those of the other class members and thus did not rule on the situation in which the named plaintiff's interests are similar, but not identical.

121. *See* cases cited note 22 *supra*. *See also* Thomas v. Clarke, 54 F.R.D. 245, 249 (D. Minn. 1971), in which the court held that "[i]n order to be a member of a class it is necessary that each individual have standing to bring the suit in his own right."

122. One commentator has suggested that the representative's interests should be coextensive with those of the other class members in a defendant class action, in order to ensure that "all possible defenses should be raised by the representative parties, particularly when the defenses are a complete bar to liability." Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?*, 1971 U. ILL. L.F. 474, 481. However, identity of interest may not be necessary in the plaintiff class situation. *See* note 123 *infra*.

123. *See* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 577.

Although courts often state that the named plaintiff must possess interests "coextensive" with those of the other class members, *see, e.g.*, Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 898 (S.D.N.Y. 1975), the test that is applied seems to

Since class membership is only one of the means available to secure adequacy of representation, there is no need for it to be defined restrictively. Federal rule 23 provides various additional tools to assure the propriety of the representation. For example, the court can allow additional representatives to enter[124] or it can subdivide the class to eliminate potential conflicts of interest.[125] Notice of the action may be sent out;[126] indeed, in subdivision (b)(3) suits, in which the only real bond between the class members is the presence of common questions, individual notice to all identifiable class members is required.[127] Notice provides the opportunity for other class members to monitor the activities of the representative and to intervene or, in some cases, to opt-out,[128] if they feel that their interests are not being adequately protected.

One further aspect of class representation should be commented upon—the role of legal counsel. Although the success of any law suit depends in part on the ability of the attorneys involved, class actions, because of their inherent complexity, place even greater emphasis on the expertise of counsel. Additionally, unlike general public interest suits, an action under federal rule 23 is structured so as to bind all the

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be whether they share common objectives and positions. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Green v. Cauthen, 379 F. Supp. 361 (D.S.C. 1974); Cohen v. District of Columbia Nat'l Bank, 59 F.R.D. 84 (D.D.C. 1972); Lamb v. United Sec. Life Co., 59 F.R.D. 25 (S.D. Iowa 1972). Of course, if the representative's position is markedly different from the other members', the action must be dismissed. *See, e.g.,* Frankford Hosp. v. Blue Cross of Greater Philadelphia, 67 F.R.D. 643 (E.D. Pa. 1975).

124. *See, e.g.,* Norman v. Connecticut State Bd. of Parole, 458 F.2d 497 (2d Cir. 1972); Ernst & Ernst v. United States District Court, 457 F.2d 1399 (5th Cir. 1972); Nichols v. Schubert, 71 F.R.D. 578 (E.D. Wis. 1976). *See also* Bledsoe, *supra* note 4, at 461.

125. *See* Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); B & B Investment Club v. Kleinert's Inc., 62 F.R.D. 140 (E.D. Pa. 1974).

126. FED. R. CIV. P. 23(d)(2) specifically provides that the court may make an order

> requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

See generally 7A C. WRIGHT & A. MILLER, *supra* note 26, § 1793.

127. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

128. The opportunity to opt-out is only available to class members in actions brought under subdivision (b)(3). *See* FED. R. CIV. P. 23(c)(2) (notice to members in (b)(3) suits should include information on their ability to exclude themselves from the action); FED. R. CIV. P. 23(c)(3) (a judgment in a (b)(3) action shall include all members to whom notice was provided "and who have not requested exclusion").

class members to whatever judgment is entered.[129] Thus, the importance of ensuring that competent lawyers are involved is apparent, and courts evaluating whether rule 23(a)(4) has been satisfied have frequently included the requirement of able and experienced counsel.[130]

This recognized propriety of an inquiry into the competence of plaintiff's lawyer is, at least in part, a recognition of the fact that the attorney is truly the class representative.[131] It should be remembered that the lawyer may have as great an interest as the named plaintiff in vigorously prosecuting the action because of the potential attorney fee award if he obtains a judgment that benefits the entire class.[132] Consequently, the fact that the named plaintiff's claim becomes moot so that technically he is no longer a member of the class or the fact that plaintiff has been allegedly injured by only one of the members of a defendant class does not necessitate the conclusion that his limited interest will result in inadequate representation of the other members. In general public interest suits, it may be correct to assume that because the attorney's interests are tied to those of the individual plaintiff, the quality of representation is directly dependent upon the interest of the plaintiff. In class actions, however, the presence of the

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129. *See* note 39 *supra.*

130. *See, e.g.,* Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Amos v. Board of School Directors, 408 F. Supp. 765 (E.D. Wis. 1976).

131. Degnan, *supra* note 115 at 715. Professor Dam has argued that the Supreme Court's rigid reading of the rule 23 notice requirements in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), is implicitly a rejection of the notion of the attorney as class representative. *See* Dam, *Class Action Notice: Who Needs It?,* 1974 SUP. CT. REV. 97. If he is correct, that position seems particularly unwarranted given the additional safeguards provided in the rule itself to ensure adequate representation. *See* text accompanying notes 116-28 *supra.* Moreover, the quality of the representation is further enhanced in many instances by the fact that class actions frequently are brought by public interest lawyers or civil rights attorneys. The devotion of these individuals to their causes makes more than certain the vigorous and wholehearted prosecution of their cases.

132. A few courts have explicitly recognized that large attorney's fees may provide an added incentive to counsel's vigorous prosecution of the class action, thereby further assuring adequacy of representation. *See, e.g.,* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931 n.5 (7th Cir. 1972); *In re* United States Financial Sec. Litigation, 69 F.R.D. 24, 38 (S.D. Cal. 1975); Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd on other grounds,* 531 F.2d 1211 (3d Cir. 1976); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *rev'd on other grounds,* 438 F.2d 825 (2d Cir. 1970). The availability of large fee awards in class actions is discussed in note 35 *supra.*

attorney, a live issue, and the unnamed class members who have actual cases assures the adversariness stressed by the dissent in *Sosna*.

It should be understood, however, that the attorney's financial stake in the outcome does not prove that there is a real claim for relief; a live controversy is present because of the other non-party class members on whose behalf the attorney is suing. Moreover, the lawyer's interest alone would not be a sufficient guarantee of adequate representation. At various points in the litigation the counsel's interest may diverge from that of his clients—for example, when an early settlement would maximize his profit but seriously compromise the interests of the class members.[133] It is the presence of the other protective devices in rule 23 and the court's careful supervision of the litigation as directed by the rule,[134] in addition to counsel's interest, that properly guard the interests of the unnamed class members.

Obviously the approach just suggested requires a liberal and flexible interpretation of rule 23 and necessarily rests on the premise that there is a great need further to utilize the class action[135] because it plays an important role in public interest litigation. A much more literal and restrictive application of the rule also would be permissible.[136] The important thing to keep in mind is that in either event a focus on the rule's prerequisites, rather than on standing or mootness concepts, better clarifies the problems posed by a particular suit and gives trial courts more direction as well as discretion in determining whether to allow the action to proceed.

CONCLUSION

The need for a pluralistic solution to society's problems, taking into account the proper roles of public and private attorneys general,

133. In recognition of the possibility of a potential conflict of interest between counsel and the class, several courts have ruled that the attorney cannot also serve as the formal class representative. *See* Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976); Turoff v. May Co., 531 F.2d 1357 (6th Cir. 1976); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1971). *But see* Lamb v. United Sec. Life Co., 59 F.R.D. 25 (S.D. Iowa 1972).

134. In the settlement situation described in the text, rule 23(e) requires that the court approve any compromise proposal, thereby guarding against the faint-hearted representative or possibly unethical attorney.

135. *See* text accompanying notes 27-33 *supra*.

136. Compare the treatment of rule 23 in La Mar v. H & B Novelty & Loan Co., described in note 14 *supra*, with that in Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975), a case involving similar facts in which the class allegations were upheld.

as well as class representatives, has been well documented.[137] The legislature cannot be relied upon to remedy all social ills; the legislative process is costly and time-consuming. Even more important, the traditional role of the legislature has been to enact general statutes, leaving it to the courts and administrative agencies to establish detailed rules in order to enforce the laws. Thus, although congressional action is absolutely necessary to define those areas of the public interest that need protection, Congress is not and cannot be the sole guardian of that interest. In addition, it has long been recognized that the burden is too great for administrators to police the public interest and that "private attorneys general" are needed to help in the struggle.[138] Unfortunately, individual suits cannot suffice. Typically, they do not involve sufficient potential damages to offset even the costs of litigation, much less to provide an incentive to sue. Moreover, rigid standing requirements often present insurmountable obstacles to the individual public interest litigant. Meanwhile, bad business and governmental practices go unchecked. Professor Louis Jaffee eloquently summarized the state of affairs when he said:

> It has now become a commonplace that the individual citizen in our vast, multitudinous complexes feels excluded from government. Thus while governmental power expands, individual participation in the exercise of power contracts. This is unfortunate because the feeling of helplessness and exclusion is itself an evil, and because the individuals and organized groups are a source of information, experience and wisdom.[139]

The class action provides one vehicle with sufficient incentive and "clout" to respond to that need. Therefore, it is most important that it not founder needlessly on the shoals that have impeded other public interest suits.

Current case law sets the following boundaries. With regard to the constitutional aspect of standing, the class representative must possess a live grievance, although it may be against only one of the defendant class members. The presence of a live controversy for mootness purposes may be demonstrated by reference to the claims of the unnamed

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137. *See* Capelletti, *supra* note 1, at 880.

138. *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

139. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044 (1968).

class members. If these present an actual controversy, the mootness of the representative's claim will not result in dismissal.

There is no need to limit this approach only to suits properly certified as class actions. The requirements of rule 23 provide an adequate alternative for determining whether a suit should be allowed to proceed if the representative's claim becomes moot. If they are satisfied, then the absence of formal certification proves nothing. By thus relying on the rule's requirements and interpreting them in light of their purpose, the public interest value of class actions will be enhanced. At the same time, the courts will have more than adequate means to ensure that the public interest is being adequately protected, thereby satisfying the prudential concerns of standing and mootness.